

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Amendment of Section 73.202(b))
Table of Allotments)
FM Broadcast Stations.)
(Cleveland and Ebenezer,)
Mississippi)

MM Docket
RM-8175

FEDERAL COMMUNICATIONS
COMMISSION
OFFICE OF THE
SECRETARY

Jan 10 '94

RECEIVED

To: Chief, Mass Media Bureau

PETITION FOR RECONSIDERATION

Afro-American Broadcasters of Mississippi (hereinafter "Afro-American"), by its attorney, hereby petitions for reconsideration of the Report and Order, DA 93-1373, released December 13, 1993, in the above-captioned proceeding. In support thereof, the following is shown.

This proceeding was initiated by a petition for rule making which proposed to delete Channel 280A at Ebenezer, Mississippi, and upgrade WCLD-FM, Cleveland, Mississippi from Channel 280A to Channel 280C2. A construction permit for Channel 280A at Ebenezer had previously been granted, but the permittee requested that it be cancelled and the channel deleted.

In its Notice of Proposed Rule Making, DA 93-366, released April 20, 1993, the Commission sought comments on the proposal. Therein, the Commission stated as follows with respect to the proposal to delete Channel 280A from Ebenezer:

Since the Commission has cancelled JimBar's construction permit, the channel is considered vacant.

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If, however, comments are filed during the comment cycle in this proceeding stating an intention to file an application for the channel, upon termination of this proceeding a filing window will be opened for Channel 280A at Ebenezer. If no interest is expressed in retaining the channel, we shall delete the channel at Ebenezer. **It is Commission policy not to delete a channel in which interest has been expressed.** (Emphasis added.)¹

Afro-American timely filed comments expressing its interest in Channel 280A at Ebenezer, and stated its intention to file an application for the Ebenezer channel upon the opening of a filing window. Based on the Commission's statements in its Notice of Proposed Rule Making, the filing of this expression of interest was sufficient that the Channel be maintained at Ebenezer and a filing window opened.

However, the Commission failed to follow its stated policy. It deleted Channel 280A at Ebenezer **despite Afro-American's showing of continued interest.** Its basis for doing so was a finding that Ebenezer was not a community qualifying for a radio station of its own. Such action was improper. The Commission's NPRM failed to indicate that the attributes of Ebenezer were at all in issue; it certainly did not request any showing thereof along with the expression of interest.

The Commission is required to give proper notice of proposed rules and the basis on which it will make its decision. Absent such notice, the rulemaking proceeding

¹ Although the NPRM quoted petitioner's statements about Ebenezer's small size, it requested no information about Ebenezer, and failed to request any submission by a proponent of keeping the channel at Ebenezer, other than that quoted above.

becomes a meaningless exercise. In National Black Media Coalition v FCC, 791 F. 2d 1016 (2d Cir. 1986), the Court reiterated that "The test that has been set forth is whether the agency's notice would 'fairly apprise interested persons of the subject and issues' [of the rulemaking]." (Citation omitted.) It continued, "It is clear that here the notice given by the Commission was wholly inadequate to enable interested parties to have the opportunity to provide meaningful and timely comment on the proposal which culminated in the final decision of the agency..." Finally, the Court noted that, "[I]n cases where an administrative agency has failed to give the public advance notice of the scope of its proceedings, courts have invalidated the decisions made." Spartan Radiocasting, 619 F. 2d at 321..."

As noted above, the Commission stated that an expression of interest in the Ebenezer facility was sufficient to keep the allotment there. However, in its Report and Order, the Commission stated, "[A]lthough an interest was expressed in retaining the channel, **no contrary evidence was presented to establish that Ebenezer is a community for allotment purposes.**" (Emphasis supplied) The Commission gave no notice that it was considering deletion of the Ebenezer allotment in the face of an expression of interest. Its NPRM did not request information "to establish that Ebenezer is a community for allotment purposes." Thus, the Commission did not act in accordance with its stated policy of not deleting an allotment

when there is an expression of interest, nor with its avowed intention in this specific proceeding. For this reason, reconsideration and reinstatement of the Ebenezer allotment is fully warranted.²

Moreover, the facts warrant a finding that Ebenezer meets the Commission's criteria for a community. In 1990, only a few years ago, Ebenezer was found to be a community for allotment purposes. See 5 FCC Rcd 682 (1990). The Commission has not identified any facts which have changed significantly since that time to justify a reversal of that finding.

Ebenezer is an identifiable population grouping. It is the home of two churches, the Ebenezer Methodist Church and the Ebenezer Baptist Church. There is an Ebenezer volunteer Fire Department and an Ebenezer Water System. There is even a retail store with the name Ebenezer in it, the Ebenezer Cash Grocery.

The Commission has previously allotted FM Channels to communities having even less indicia than Ebenezer. In Yermo and Mountain Pass, California, 45 RR 2d 58 (Broad. Bur. 1979) an FM channel was allotted to Mountain Pass, which had an estimated population of 250-260. The Commission found a "community of purpose" among the residents, and noted that

² In a footnote, the Commission's Report and Order indicates that Afro-American should have been on notice from petitioner's filing that evidence supporting Ebenezer's community status should have been presented. This is clearly an *ex post facto* response, given the statements in the NPRM which are cited above.

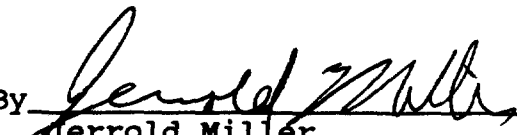
there was a road sign identifying the town and a separate postal Zip Code. The Commission further recognized that a Mountain Pass station would serve the needs of transients along a nearby Interstate highway.

An Ebenezer station similarly would serve those traveling on an interstate highway. Interstate 55 is a major north-south route through Mississippi. Clearly, Ebenezer meets the Commission's definition of a community for allotment purposes.

Accordingly, reconsideration should be granted, and the allotment of Channel 280A to Ebenezer, Mississippi should be reinstated. Afro-American will apply for an Ebenezer station during the filing window, and will promptly construct its station upon grant of its application.

Respectfully submitted,

AFRO-AMERICAN BROADCASTERS OF MISSISSIPPI

By 
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January 10, 1994

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 19 94
a copy of the foregoing document was placed in the United States
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